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No. 84-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant,

v.

THE STATE OIL & GAS BOARD OF MISSISSIPPI
AND COASTAL EXPLORATION, INC., *et al.*,
Appellees.

On Appeal From The Supreme Court Of The State Of Mississippi

BRIEF FOR THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE

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BRIEF FOR THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 36 in support of Appellant's request for reversal of the judgments below.

INTEREST OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America (INGAA) is a non-profit national trade association whose mem-

bership includes virtually all of the major natural gas pipeline companies subject to the Federal Energy Regulatory Commission's (Commission)[1] jurisdiction under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.* For many years, INGAA has appeared in rulemaking, rate and certificate proceedings before the Commission and the courts when issues affecting the general interests of its members and of the natural gas industry were involved. A list of INGAA's membership is set forth in the appendix to this brief.

The Mississippi Supreme Court's decision here on appeal upholds the Mississippi State Oil and Gas Board's (Board) Order No. 409-82,[2] issued pursuant to its Rule 48, insofar as the Board orders Appellant, Transcontinental Gas Pipe Line Corporation (Transco), to purchase gas ratably from all other producers in the Mississippi gas fields here involved, even those with which Appellant has no contracts.[3] The Board's order comes at a time when Appellant and other interstate gas pipelines are experiencing excess gas deliverability and facing "take or pay" liabilities to producers of

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[1]The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission; when used otherwise, the reference is to the Federal Energy Regulatory Commission.

[2]Order No. 409-82 is attached as Appendix C to Appellant's Jurisdictional Statement.

[3]The Mississippi Supreme Court's decision is reported at 457 So.2d 1298 (Miss., 1984) and is reproduced in Appendix A (referred to herein as App. A) to Appellant's Jurisdictional Statement. The Court reversed Order No. 409-82 insofar as it sought to regulate the price for the gas that Transco would be required to take from non-contract producers. Instead the Court required Transco to pay a "reasonable price" (App. A, pp. 48a-55a).

unprecedented dimension.[4] Unless overturned, the order will not only exacerbate this serious crisis as to Appellant and other interstate pipelines purchasing gas in Mississippi and the consumers ultimately served by those pipelines, but will serve to sanction similar state actions.[5] Because of the national importance of this case to the interstate gas industry and the ultimate consumers of gas, INGAA is filing this brief as *amicus curiae*.

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[4]The critical nature of the take-or-pay problem was described by the Commission in *Columbia Gas Transmission Corp., et al.*, 26 FERC ¶61,031, at 61,081 (1984):

> As of December 31, 1982, for example, 18 interstate pipelines had already filed to recover in rates the carrying costs on over $700,000,000 in take-or-pay prepayments. By November 30, 1983, claimed gas prepayments totaled approximately $775,000,000. Estimates of the total potential prepayment liability for pipelines as a whole over the next two to three years are staggering.

As of December 31, 1983, the take-or-pay prepayment balances reported by major pipelines totalled approximately $1 billion. Energy Information Administration, Department of Energy, *Statistics of Interstate Natural Gas Pipeline Companies*, Table 20 (1983).

Gas purchase contracts between producers and pipelines generally contain take-or-pay provisions requiring the pipeline to take, or else pay for, a certain portion of the gas tendered by the producer. The contracts usually provide for a certain period in which the pipeline can make-up the volumes not taken. In pipeline ratemaking, such prepayments for gas not taken are reflected in the cost of service as a part of the working capital upon which the pipeline is allowed its cost of capital. *Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations*, Statement of Policy and Interpretative Rule, issued April 10, 1985, pages 4-5, 50 Fed. Reg. 16076.

[5]This brief does not address the validity of conservation rules or orders in states other than Mississippi, which may operate differently and have a different impact on the pipeline.

CONSENT OF THE PARTIES

INGAA has obtained the consent of the parties to this appeal for filing its brief *amicus curiae*. The consent statements are attached to the original signed copy of the brief filed with this Court.

STATEMENT

INGAA relies on the more complete statement of the case in the brief filed by Appellant.

The Mississippi Supreme Court's decision holds that the state may regulate the gas purchasing pattern of an interstate pipeline system to require it to take gas ratably, if at all, from producers in the Mississippi gas fields here involved, even from those producers who do not have a contract with the pipeline (App. A, p. 291a).

On the question of preemption, the Court concludes that this Court's decision in *Northern Natural Gas Company* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963), striking down a similar Kansas ratable take regulation because of conflict with the Federal Power Commission's jurisdiction under the NGA, is no longer a bar to state regulation because of the intervening enactment of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301, *et seq.*, particularly Section 601(a), [15 U.S.C. § 3431(a)(1)], deregulating first sales of the high-cost natural gas here involved (App. A, p.26(a)):

> Section 601(a)(1) [15 U.S.C. § 3431(a) (2)] means what it says - the Natural Gas Act of 1938 (NGA) and FERC's jurisdiction under the Act *never* apply to deregulated gas, and certain other categories of gas. That message is decisive of the preemption issue in this case. The reason the Supreme Court voided the ratable take order in *Northern Natural* was because at that par-

> ticular point in time such an order substantially affected gas which was subject to the FPC's (FERC's) jurisdiction under the NGA. If the NGA and the FERC's jurisdiction under the NGA no longer extend to deregulated gas, and FERC has no authority to regulate the first sales and purchases of deregulated gas either directly or indirectly, then *Northern Natural* does not dictate a preemption of otherwise existing state authority. (Emphasis in original)

The Court further concludes that Congress in deregulating first sales of the gas under the NGPA did not preclude state regulation of the wellhead sales of deregulated gas (App. A, p. 29a):

> Our study of the terms and provisions of the Natural Gas Policy Act of 1978, however, convinces us that the Congress has not proscribed state regulation of wellhead sales of deregulated gas. However consistent a continued proscription on state regulation might have been with the theoretical underpinnings of deregulation, the Congress in NGPA in 1978 did not ban state regulation of deregulated gas. What, and all, the Congress has done insofar as we are concerned is strip away federal regulatory authority thus leaving in effect and wholly exercisable such state regulatory authority as otherwise exists. The lynchpin that holds *Northern Natural* together having been removed, and not having not been replaced by a congressional enactment that wellhead prices of deregulated gas be left unregulated by the states as well, Transco's preemption claim fails. The states today have the authority to require that an interstate pipeline company take deregulated gas ratably and without discrimination in favor of one owner, operator or producer and against another in the same common source of supply. *Cities Service Gas Co.*

v. *Peerless Oil & Gas Company*, 340 U.S. 179, 185, 71 S.Ct. 215, 219, 95 L.Ed. 190, 201 (1950).

On the question of whether the Board's order is prohibited by the Commerce Clause, the Court held that, although the order can impose a burden on interstate commerce by increasing prices to consumers, "Congress within the scope of its power under the affirmative Commerce Clause has expressly authorized such increases" in enacting the NGPA. Moreover, the Court concludes that the burden is of Appellant's own making because of the take-or-pay provisions in its contracts and "[i]f higher purchasing prices at the wellhead lead to higher prices to the consumer and a loss of markets, this is simply one inevitable consequence of the free market policies of the era of deregulation with respect to which Transco is vested by the negative Commerce Clause with no right to complain" (App. A, p. 38).

Finally, the Court declined to consider whether a less burdensome alternative adequate to protect local interests could have been chosen by the State on the ground that such an inquiry is not called for "until it first be established that the regulation in question creates an unreasonable burden on interstate commerce" (App. A, p. 38).[6]

SUMMARY OF ARGUMENT

I. In concluding that this Court's decision in *Northern Natural* is no longer controlling because of the intervening deregulation provisions of the NGPA concerning the gas here involved, the Mississippi Supreme Court misconceives

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[6]Article VI, clause 2 ("Supremacy Clause") and Article I, Section 8, clause 3 ("Commerce Clause") of the Constitution of the United States and the pertinent statutory provisions of NGA and NGPA to this appeal are set forth in Appendix G of Appellant's Jurisdictional Statement.

the scope of deregulation under the NGPA and the holding under *Northern Natural*. While the NGPA did remove the Commission's certificate and rate authority concerning first sales of certain categories of gas, it did not alter the Commission's exclusive jurisdiction under Section 1(b) 15 U.S.C. § 717(b), of the NGA, over pipeline transportation which was the focal point of conflict in the *Northern Natural* case. The Board's order in this case, like the similar ratable take order in the *Northern Natural* case, violates the Supremacy Clause because it is directed in its impact and effect at the pipeline purchaser and not at the producer and thereby directly conflicts with the Commission's exclusive jurisdiction to regulate pipeline transportation under Section 1(b) of the NGA. As a condition to obtaining gas under contract from the fields here involved, the order would force Transco to buy gas it may not need or want from non-contract producers. Therefore, the order is not merely incidental to the regulation of the production of gas for conservation purposes.

II. Nor is there any basis for the Court's conclusion that, by implication, Congress intended in the NGPA to remove the historical barriers to direct state regulation of interstate pipelines. To the contrary, the NGPA extended federal authority to include intrastate sales and where Congress intended to cede Commerce Clause authority to the states, it did so expressly - which is not the case here.

III. Moreover, by requiring the pipeline to buy gas that it may not need or want from non-contract producers as a condition to buying gas under contract from the fields here involved, and thereby exposing the pipeline to an increase in its cost of service, the Board's order violates the Commerce Clause by placing an impermissible and unjustified burden on interstate commerce in the name of state conservation. In evaluating this burden, it was clear error for the Mis-

sissippi Supreme Court to refuse to consider that there are other conservation alternatives available to the state that could protect local interests without burdening interstate commerce.

ARGUMENT

I.

The Mississippi State Board's Order Directed At Pipeline Purchasers Violates The Supremacy Clause By Trespassing Upon The FERC's Continuing And Exclusive Jurisdiction To Regulate Interstate Natural Gas Pipeline Operations

In concluding that the deregulation provision of Section 601(a), 15 U.S.C. § 3431(a)(1), of the NGPA "is decisive of the preemption issue in this case," the Court rationalizes that: "If the NGA and FERC's jurisdiction under the NGA no longer extend to deregulated gas, and FERC has no authority to regulate the first sales and purchases of deregulated gas either directly or indirectly, then *Northern Natural* does not dictate a preemption of otherwise existing state authority" (App. A, p. 26a). The defect in this rationale, however, is that, while Section 601(a)(1) of the NGPA did deregulate certain categories of first sales of gas, it did not eliminate the Commission's NGA jurisdiction over pipeline transportation and sales which is central to the preemption question in this case, as it was in *Northern Natural*.

It is correct, as the Court points out, that Section 601(a)(1) of the NGPA removes the Commission's rate setting and certificate jurisdiction over the categories of first sales in this case. It is also correct that the Commission, under the NGPA, cannot deny a pipeline the authority to "pass-through" to its customers the prices it pays at the wellhead, unless the Commission "determines that the amount paid [by the pipeline] was excessive due to fraud,

abuse or similar grounds" (App.. A, p. 27a). However, it is not correct that a "comparison of Rule 48 with federal law reveals no point of natural conflict" (App. A, p. 27a).

In *Northern Natural*, the conflict which this Court was concerned with was not the conflict between the Kansas ratable take order and the Commission's NGA jurisdiction over the sale of the gas by producers, but rather the Commission's traditional NGA jurisdiction over pipelines (372 U.S. at 92):

> The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 - a task which would otherwise presumably be the State Commission's. Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. See *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610, 64 S.Ct. 281, 291, 88 L.Ed. 333.[7]

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[7]Unless otherwise stated, emphasis is in the original.

After reviewing other cases dealing with state conservation orders, including *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950), relied on by the Court below, this Court explained that (372 U.S. at 94):

> . . . our cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at producer and production. The former cannot be sustained when they threaten, as here, the achievement of the comprehensive scheme of federal regulation.

As in *Northern Natural*, the state order here in question is directed in its impact and effect at the interstate pipeline purchasers, and not at the producers. As in *Northern Natural*, the state order would interfere with the pipeline "purchasing patterns" which "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States."

The Board's order confronts Transco and other pipeline purchasers similarly situated with the same Hobson's choice described in *Northern Natural*[8] at a time when Transco and the interstate natural gas pipeline industry as a whole, are faced with more gas deliverability under contract than can currently be marketed. Transco's undesirable choices are to (1) increase its takes above the gas it wants or needs from the non-contract producers in the Mississippi fields until they become ratable with the highest amount that Transco is obligated to take from under its contract minimum take obligation with a contract pro-

[8]Dissenting opinion, 372 U.S. at 99, footnote 1.

ducer in the same field; or (2) continue to take the same amount from the field as a whole but reallocate its takes so as to make them ratable by reducing its takes below contract minimum from those producers who have contracts with Transco. In the first instance, in order to take the non-contract volumes which it does not need or want, Transco would have to cut-back on its purchases from contract producers in other producing areas, thereby increasing its exposure of having to pay for gas which it cannot take under the minimum take provisions of those contracts. In the second instance, Transco would have to reduce its purchases from contract producers in the field in order to take the volumes from the non-contract producers, thereby again exposing itself to having to pay for gas which it cannot take from the contract producers.[9] It is this adverse interference and impact of the State's order on the pipeline's operations that conflicts with the Commission's jurisdiction and responsibility to regulate pipeline operations toward the goal of obtaining an adequate supply of natural gas for the interstate market "at the lowest possible reasonable rate consistent with the maintenance of adequate service." *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 388 (1959); *Maryland* v. *Louisiana*, 451 U.S. 725, 748-9 (1981).[10]

[9]As mentioned earlier, this brief does not address the impact or operation of conservation rules or orders in states other than Mississippi.

[10]Indeed, the necessary purchase requirements from non-contract producers to satisfy Rule 48 conflicts with the Commission's Statement of Policy issued December 16, 1982 on take-or-pay provisions in gas purchase contracts. 47 Fed. Reg. 57268 (Dec. 23, 1982). Recognizing that take-or-pay contract obligations may be shielding the prices of deregulated and other higher cost gas from market constraints, the Commission announced a policy against any new or modified contracts containing provisions for take-or-pay liability in excess of 75

The Court goes too far in construing Section 601 of the NGPA as removing all incidents of Commission jurisdiction simply because this gas has been deregulated, including Commission jurisdiction over pipeline operations under Section 1(b) of the NGA, which was the point of conflict in *Northern Natural*. Accepting the Court's statement that Section 601(a)(1) of NGPA "means what it says," it does not say, as the Court concludes, that "the Natural Gas Act of 1938 (NGA) and FERC's jurisdiction under the Act *never* apply to deregulated gas, and certain other categories of gas" (App. A., p. 26a). To be sure, as to the categories of gas addressed in subparagraphs (A) and (B) of Section 601(a)(1), that Section states that "for purposes of Section 1(b) of the Natural Gas Act, . . . the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply" to the specified categories of natural gas (App. A, p. 25a). However, that language cannot be read alone, for it goes on to say that the NGA jurisdiction which is being removed by Section 601(a)(1)(A)(B) is expressly limited to that which exists "*solely* by reason of any *first* sale of such natural gas." (15 U.S.C. § 3431(a)(1)(A)(B))

This limitation is reemphasized in Subparagraph 601(a)(1)(D) of the NGPA which parallels Subparagraphs 601(a)(1)(A) and (B) in exempting from "natural gas company" jurisdiction those persons as to whom NGA jurisdic-

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percent of annual deliverability from the producers' wells. Under the policy, there is a rebuttable presumption that prepayments will not be reflected in rates if the prepayments are made pursuant to new contracts or amendments which exceed the 75 percent annual deliverability limit. Under Rule 48, however, pipelines could be required to take in excess of 75 percent deliverability from non-contract producers if they purchase their minimum take-or-pay volumes from producers in the same gas pool under existing contracts entered into prior to December 16, 1982, containing a take-or-pay requirement in excess of 75 percent of deliverability.

tion would have applied but for the exemptive provisions of Subparagraphs (A) or (B). Again, the "solely by reason of" language used in Subparagraph (D) to refer to Subparagraphs (A) and (B) effectively counters the Court's conclusion.

By treating the phrase "solely by reason of" as if it is absent from Paragraph 601(a)(1), the Court's interpretation violates the "elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." 2A J. Sutherland, *Statutes and Statutory Construction*, § 46.06 at 63 (C. Sands 4th ed. 1973) (quoting *State ex rel First National Bank of Crete* v. *Bartley*, 39 Neb. 353, 58 N.W. 172, 174 (1984)); *see National Ass'n of Recycling Indus.*, v. *ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981).

What Congress was careful to spell out in Paragraph 601(a)(1) of the NGPA was that, of the several occasions for NGA jurisdiction over the sale and transportation of natural gas in interstate commerce, *solely* that jurisdiction arising out of the "first sale" of natural gas was being affected by Paragraph 601(a)(1). That is, where NGA jurisdiction would have attached "solely by reason of any first sale of such natural gas," such jurisdiction was limited by the NGPA. More specifically, *solely* the certificate and rate-setting powers over certain categories of producer sales were removed.

Moreover, Congress was careful in Section 601 to distinguish between the Commission's sales jurisdiction and transportation jurisdiction. Thus, Subsection 601(a) entitled "Jurisdiction of the Commission under the Natural Gas Act" has two paragraphs. Paragraph (1) is entitled "Sales," and Paragraph (2) is entitled "Transportation." The

Commission's transportation jurisdiction, which the Court ignores, was left virtually untouched by the NGPA.[11]

Thus, contrary to the Court's conclusion, Congress did not place beyond the Commission's regulatory reach all incidents of the categories of gas enumerated in Paragraph 601(a)(1) of the NGPA. Congress merely stated that the Commission has no NGA Section 1(b) jurisdiction "*solely* by reason of any first sale of such natural gas." Section 1(b) of the NGA gives the Commission jurisdiction over (1) the transportation of natural gas in interstate commerce, (2) the sale for resale of natural gas in interstate commerce, and (3) natural gas companies engaged in such transportation or sale. "Each of these is an *independent* grant of jurisdiction . . ." *FPC* v. *Louisiana Power & Light*, 406 U.S. 621 at 636 (1972). Congress' careful wording in Paragraph 601(a)(1) affected only the "first sale" level of jurisdiction, and left undisturbed the Commission's jurisdiction over all other attributes of interstate commerce respecting the enumerated categories of gas, *i.e.*, interstate transportation by natural gas companies and their subsequent sales for resale. The presence of those attributes triggers Commission jurisdiction which preempts the Board's order in this case.

II.

In Deregulating Certain First Sales Congress Did Not Intend To Open The Door To State Regulation Of Interstate Pipeline Purchases

While the Court states (App. A, p. 29a) that its study of the NGPA "convinces us that Congress has not proscribed

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[11]Paragraph 601(a)(2) of the NGPA, entitled "Transportation," changed the Commission's NGA Section 1(b) transportation authority only in certain limited areas not pertinent here. What is pertinent, however, is that Paragraph 601(a)(2) evidences the fact that where Congress intended to limit the Commission's NGA transportation authority, it said so in express terms.

state regulation of wellhead sales of deregulated gas," it cites no evidence that Congress intended to cede to the states the authority asserted here to regulate interstate pipeline purchases.

Where Congress intended in the NGPA to cede authority to the states, it did so expressly. Thus, in extending federal authority to include ceiling prices for first sales in intrastate commerce, 15 U.S.C. § 3315(a) (Supp. IV), Congress provided the states with authority as to such intrastate sales "to establish or enforce any maximum lawful price for first sale of natural gas produced in such state which does not exceed the maximum lawful price" established by the NGPA. *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 185 (1983); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 419 (1983). As to this provision, the House and Senate Conference Reports on the NGPA both stated: "The Congress is ceding its authority under the commerce clause of the Constitution to regulate prices for such production to affected States." S. Conf. Rep. No. 85-1126, p. 125 (1978); H.R. Conf. Rep. No. 95-1752, p. 125 (1978).

In light of the express grant of authority in the NGPA to the states where Congress intended to cede authority, there is no valid basis for assuming that Congress intended, through silence, to open the door to state regulation of interstate pipelines.[12] This is particularly so, in view of the long judicial history invalidating attempted state regulation over interstate pipeline purchasers before and since the passage of the Natural Gas Act.[13] As stated in *Northern Natural*, 372 U.S. at 90:

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[12]*See Public Service Comm'n of New York* v. *Mid- Louisiana Gas Co.*, 463 U.S. 319, 336 (1983).

[13]See cases cited in *Northern Natural*, 372 at 90.

> "[I]t was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the States - whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power."

In *Maryland* v. *Louisiana, supra*, issued after passage of the NGPA, this Court reaffirmed the FERC's exclusive jurisdiction over interstate pipeline regulation in invalidating a state taxing statute because "like the state Commission's order in *Northern Natural Gas, supra*, it is inconsistent with the federal scheme" (451 U.S. at 751). Following *Maryland* v. *Louisiana*, this Court, in *Exxon Corp.* v. *Eagerton*, struck down a "pass-through prohibition" in an Alabama severance tax statute on oil and gas because it interfered with Federal Regulation under the NGA. These cases reinforce the view that Congress left no room for state regulation over interstate pipeline operations.

III.

The Mississippi Board's Order Is Invalid Under The Commerce Clause

In concluding that the Board's order imposes a permissible burden on interstate commerce, the Court reasons that it need not reach the question of whether the state had a less burdensome alternative adequate to protect the local interest because (App. A, p. 38a):

> "The search for such alternatives * * * need not be made in connection with our Commerce Clause inquiry *until it first be established that the regulation in question creates an unreasonable burden on commerce.*" (emphasis supplied)

The obvious defect in this rationale is that, if the regulation is first determined to create "an unreasonable burden on commerce," it moots the need for determining whether the state could have adopted less burdensome alternatives. Thus, under the Court's rationale, the search for alternatives would never be reached, notwithstanding the Court's acknowledgement that under "the *Pike* v. *Bruce* balancing test * * *, the Supreme Court has made it clear that this inquiry [for alternatives] must be taken seriously" (App. A., p. 38a).

It logically follows that, in determining whether a burden on interstate commerce is reasonable under a balancing test, consideration of the alternatives available to the state to carry out its purpose should be part of the process. *Dean Milk Co.* v. *City of Madison, Wisconsin*, 340 U.S. 349, 356 (1950); *Pike* v. *Bruce Church*, 397 U.S. 137, 143 (1970) ("the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities"). As this Court stated in *Northern Natural* (372 U.S. at 93):

> the problem * * * is not as to the existence or even the scope of a State's power to conserve its natural resources; the problem is only whether the Constitution sanctions the particular means chosen* * *.

In any case, the Court is wrong in concluding that the burden on interstate commerce imposed by the Board's regulation is permissible. As in *Northern Natural* the regulation here in question would "shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of * * * natural gas wells "* * * - a task which would otherwise presumably be the State Commission's" (372 U.S. at 92). In *Northern Natural*,

this Court indicated that this shift of burden was impermissible, citing by comparison *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954), holding that the attempted imposition of the collection of a use tax by the state of Maryland upon a Delaware merchandising corporation that sold goods in Delaware to Maryland inhabitants was a violation of the Commerce Clause. Moreover, and more importantly, Rule 48 is statewide and, unless overturned, would force pipelines, during this period of restricted demand and intensive price competition, to increase their cost of service for the reason explained earlier. Unless Rule 48 is overturned, Transco and virtually all over pipelines could be subject to orders from several producing States concerning their purchasing practices in those states.

The Court reasons, however, that, even if the State's rule increases the cost of service to the interstate customer, "Congress within the scope of its power under the affirmative Commerce Clause has expressly authorized such increases" in enacting the NGPA (App. A., pp. 35a-36a). The increases contemplated by the NGPA, however, were not increases emanating from state regulation, but rather increased ceiling prices for gas designed to induce greater exploration and development. Moreover, these increased ceilings were not an end in themselves, but merely a means by which Congress hoped to achieve adequate gas supplies for interstate consumers at a reasonable cost. Thus, state regulation which seeks to impose on a pipeline the burden of purchasing gas which it does not need or want, or to otherwise incur increased take-or-pay costs due to the current oversupply, is not consistent with the goals of the NGPA.

Nor is there any basis for the Court's view that the burden is a burden upon Transco rather than upon interstate commerce and that it is "traceable to its contract with Getty, not to Rule 48" (App. A, p. 36a). As the Court itself

points out, under the NGPA, pipelines are entitled to recover their cost of purchased gas absent a finding of fraud, abuse or similar grounds (App. A, p. 27a). Accordingly, increased costs stemming from Rule 48 will ultimately be borne by the interstate consumer. Moreover, this increased cost is clearly traceable to Rule 48 which is directed in its impact and effect at pipeline purchasers. This cost would not be incurred if the state had adopted constitutionally sanctioned conservation rules directed at the producers, rather than at the pipeline, such as discussed in *Northern Natural* (372 U.S. at 94, n. 12). Indeed, there is no evidence to show, nor even a claim, that, as a result of *Northern Natural*, producing states, such as Mississippi, have been unable to carry out their conservation responsibilities.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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